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December 7, 2021

By ECF

Hon. Eric Komitee
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Diaz Cruz v. United States & Henry V. Santana*,
No. 20-CV-00891 (EK) (SJB) (E.D.N.Y.)

Dear Judge Komitee:

This Firm represents Defendant Henry V. Santana, a U.S. Immigration and Customs Enforcement deportation officer, in the above-referenced *Bivens* action.

We write respectfully with an update relevant to Officer Santana's motion to dismiss Plaintiff's Second Amended Complaint, which has been fully briefed since September 3, 2021. *See* ECF Nos. 48 to 48-5. The Complaint asserts *Bivens* claims against Officer Santana under the Fourth and Fifth Amendments for allegedly excessive force in connection with a February 2020 shooting incident. The Complaint also asserts claims against the United States under the Federal Tort Claims Act.

On November 5, 2021, the U.S. Supreme Court granted certiorari in *Egbert v. Boule*, No. 21-147, a *Bivens* case involving claims against a Border Patrol agent. *See* 2021 WL 5148065 (U.S. Nov. 5, 2021). The questions presented are (i) whether a cause of action exists under *Bivens* for First Amendment retaliation claims; and, directly relevant here, (ii) whether a cause of action exists under *Bivens* for claims against federal officers engaged in immigration-related functions for allegedly violating a plaintiff's Fourth Amendment rights. *See* Petition for a Writ of Certiorari at (I), *Egbert v. Boule*, No. 21-147 (U.S. July 30, 2021).

Plaintiff's brief in opposition to Officer Santana's motion to dismiss (ECF No. 48-3, at 18-19) relies heavily on the Ninth Circuit's ruling in *Boule* that Border Patrol agents may be liable under *Bivens* for allegedly violating Fourth Amendment rights in the course of securing the border. *Boule v. Egbert*, 998 F.3d 370, 385-92 (9th Cir. 2021) (amended opinion); *see also id.* at 373-85 (separate opinions ofumatay, Owens, and Bress, JJ., on behalf of 12 judges, each dissenting from denial of rehearing en banc).

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It is our understanding that the Supreme Court will hear oral argument in *Egbert v. Boule* during its February 2022 sitting.

We are available to respond to any questions this Court may have.

Respectfully submitted,

/s/ David J. Goldsmith

David J. Goldsmith

cc: All Counsel of Record
(by ECF)